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No. 355

In the Supreme Court of the United States

OCTOBER TERM, 1961

MANNIE GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (2 R. 5–17;[1] Pet. App. 1a–14a) is reported at 290 F. 2d 729.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1961 (2 R. 18; Pet. App. 15a). A petition for rehearing was denied on August 10, 1961 (2 R. 29; Pet. App. 16a–17a). The petition for a writ of certiorari was filed on August 23, 1961. The juris-

[1] On file with the Clerk of this Court is a two-volume record and a detailed accounting analysis introduced at trial as Government Exhibit 23. Volume I of the Record (pp. 1–211) is referred to herein as "1 R."; Volume II (pp. 1–63) is designated "2 R."

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient, under the special rules applicable in perjury cases, to sustain petitioner's conviction.

2. Whether the trial court properly left to the jury the question of the credibility of the government witnesses.

3. Whether prejudicial error resulted when, in answer to a question by the prosecutor, government witness Mishel read aloud a portion of his own grand jury testimony which included reference to petitioner as "shylocking".

STATUTE INVOLVED

United States Code, Title 18, Section 1621, provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

A four-count indictment returned on November 20, 1956, in the United States District Court for the Southern District of New York, charged that peti-

tioner committed perjury, in violation of 18 U.S.C. 1621, in his testimony before a federal grand jury investigating possible violations of federal criminal statutes. Count one charged that petitioner wilfully testified falsely under oath before the grand jury on May 22, 1956, that he had not known nor met Abraham Chait before the formation, in August 1945, of Stern's Express Company, a trucking partnership (1 R. 7–8). Count two charged that on the same date petitioner testified falsely that Chait never received any money from Stern's Express Company (1 R. 8–9). Count four alleged that petitioner testified falsely before the grand jury on June 21, 1956, when he again denied that he had known Chait before the formation of the partnership (1 R. 11–13).[2]

Following a jury trial, petitioner was found guilty on each of counts one, two and four (1 R. 183). He was sentenced to three years' imprisonment on each of these counts, to run concurrently, and fined $2,000 on each count (1 R. 193–194, 195).

A. THE EVIDENCE[3]

1. *Counts one and three.*—Petitioner and Joseph Stern had been partners in Stern's Express Company,

[2] The third count, charging that petitioner committed perjury on June 21, 1956, when he testified before the grand jury that Chait was not a partner in Stern's Express (1 R. 10–11), was dismissed at the close of the government's case (1 R. 131).

[3] At the outset of the trial, it was stipulated that petitioner had testified under oath before the grand jury on May 10, 22, and June 21, 1956; that the transcript of his grand jury testimony introduced at the trial was an accurate recordation of that testimony; and that the questions asked of petitioner before the grand jury, and contained in the indictment, were material (1 R. 15, 28–30).

a trucking firm organized in August 1945 and dissolved in October 1953 (1 R. 31).

Stern testified that, before the formation of the partnership in August 1945, he had seen petitioner and Chait together once or twice "talking nice" (1 R. 54; see 1 R. 32, 52-53), and that Chait had attended the organizational meeting of the partnership together with Stern and the petitioner (1 R. 32). To corroborate Stern's eyewitness testimony, Irving Mishel testified for the government that petitioner had told him (prior to petitioner's grand jury testimony in 1956) of a conversation with Chait during which Chait had told petitioner he was going to put petitioner in his (Chait's) trucking business and that they would work out "a proposition" (1 R. 105). Shortly thereafter Stern's Express Company was formed. Mishel further testified that he believed petitioner knew Chait before the end of the Second World War (1 R. 105–107; see 1 R. 108).[4]

2. *Count two.*—The evidence in support of count two—that petitioner testified falsely before the grand jury in claiming that Chait had received no money from Stern's Express Company—stemmed from three separate sources.

a. On direct examination, Stern testified that, a few months after the organization of the firm, he and petitioner discussed some "expense drawing" for Chait (1 R. 34–39). After refreshing his recollection from

[4] Although not particularized as to time, Mishel testified that he and petitioner met Chait in a barber shop "many a Saturday," and that on one occasion petitioner took him to visit Chait in his home at Peekskill, New York (1 R. 108).

his 1956 grand jury testimony (1 R. 39–40), Stern recalled that it was decided that Chait was to draw money from the business (1 R. 40–41) and that it was "agreed to a certain extent" that, when Stern and petitioner drew money from the business, Chait was also to draw funds (1 R. 40). Stern further stated that Chait drew money "[w]hen business was better" (1 R. 41), that at such times he drew as much as each of the partners and that the money given to Chait was "taken out of expenses" (1 R. 42).

About halfway through Stern's direct testimony, the trial court allowed the prosecutor to examine him as a hostile witness with respect to his grand jury testimony, because of his vague, guarded and, at times, unresponsive testimony (1 R. 43). During the interrogation that followed, Stern testified that as far as he knew Chait drew the same amount of money from the business as did the partners (1 R. 43–46), and that Chait "was part of the business" (1 R. 50). He thereafter testified that he never gave any money to Chait and that he did not know whether petitioner had given Chait money (1 R. 49; see also Stern's cross-examination, 1 R. 61, 70–71). In answer to questions propounded by the trial judge, Stern stated that he did not know "whether [Chait] got any money exactly" (1 R. 72). Just before the close of his testimony, on further inquiry from the trial court, he admitted that he had discussed "expenses" with petitioner (1 R. 73–74), who told him that money for Chait was included in the labor expense of the business (1 R. 75).

b. After referring extensively to his grand jury testimony (*e.g.*, 1 R. 93–94, 95–96), and affirming that his answers were "true now as then" (1 R. 102, 105, 107, 108, 117), Mishel recalled that, some ten to fifteen years before, he had discussed Stern's Express Company with the petitioner and that some of these conversations related to Abe Chait (1 R. 94–96). He further recalled petitioner telling him of payments to Chait from Stern's Express Company, but not the exact amount (1 R. 101–102; see 1 R. 103–104).[5]

c. Earl Hassel, Jr., a special agent of the Federal Bureau of Investigation, testified that he had made an analysis of the books and records of Stern's Express Company in order to determine the allocation of cash checks to payroll expenses, and to the drawing of the partners during the life of the partnership. This analysis, which was introduced at the trial (G. Ex. 23;[6] see 1 R. 86–87), revealed that from August 3, 1945, until September 30, 1947, petitioner and Stern drew $100 each per week, charged to the "drawing" account. For this same period of time, except for two weeks, the checks allocated to unidentified "expenses" amounted to at least $100 per week. For the last ten weeks of this period, payments out of the expense account averaged $114 per week. From

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[5] In his testimony before the grand jury, Mishel had stated that petitioner had informed him that Chait was receiving $150 or $200 a week from Stern's Express (1 R. 103–104). At the trial, Mishel stated: "That was my answer then; it is my answer now. I don't recall exactly what it was. All I know is this is what I stated, and anything I stated was the truth" (1 R. 104).

[6] As already noted (see fn. 1, *supra*, p. 1), this exhibit is part of the record filed with the Clerk of this Court.

October 7, 1947, until May 13, 1951, petitioner and Stern shared $250 per week, while the amount drawn from the expense account was never less than $125 per week. From May 22, 1951, through October 26, 1953, each of the partners' drawings increased to $150 per week, and the expense account correspondingly rose, never falling below that amount (see 1 R. 124–128).

B. THE COURT'S INSTRUCTIONS

After the trial court charged the jury as to reasonable doubt (1 R. 161–163), stated the elements of the offense (1 R. 164–165) and read material portions of the indictment (1 R. 166–167), it marshalled the evidence (1 R. 169–170) and pointed out that it was ultimately for the jury "to decide what credence, if any, you will give to it" (1 R. 170). The court further instructed the jury that a conviction of perjury must be based upon the testimony of two witnesses, or the direct testimony of one witness corroborated by other substantial evidence (1 R. 170–171), and defined direct testimony as that "which proves the truth of the matter asserted without requiring any inference: other than the inference that what the witness reports to be the fact is, in fact, the fact" (1 R. 171). The court continued (1 R. 172):

> If you, the jury * * * find that there has been direct testimony of two credible witnesses from which he [*sic*] can conclude beyond a reasonable doubt that the defendant did not believe to be true that part of the defendant's testimony set forth in a count of the indictment, or if the direct testimony of one credible witness cor-

> roborated by other evidence convinces you beyond a reasonable doubt that that specified testimony of the defendant was wilfully false, then the requisite quantity and quality of proof has been submitted to prove the crime of perjury.

On the credibility of the witnesses the judge charged (1 R. 173):

> You will judge it by applying your ordinary, everyday common sense. How did the witness impress you? Was the testimony consistent with any undisputed facts in the case? Was his testimony corroborated?
>
> * * * * *
>
> * * * What you accept or reject is up to you. You are the triers of the facts.

ARGUMENT

1. The government's evidence in the present case meets the standard applicable in perjury trials that "[t]he Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of * * * one witness and corroborating circumstances." *Weiler* v. *United States*, 323 U.S. 606, 607.

a. The evidence on counts one and four consisted of the eyewitness testimony of Stern that, before the formation of Stern's Express Company in 1945, he had seen petitioner and Chait together, and that he, petitioner and Chait were present at the organizational meeting of Stern's Express. In corroboration, Mishel testified to conversations with petitioner (held before petitioner's grand jury appearance) which

substantiated Stern's testimony that petitioner had known Chait before the formation of Stern's Express. (See the Statement, *supra*, p. 4.)

Contrary to petitioner's contentions (Pet. 17–18), the testimony of Mishel was sufficient as corroborative evidence in the perjury prosecution even though it pertained only to petitioner's oral admissions, because it substantiated "the testimony of a single witness," Stern, who had sworn "to the falsity of the alleged perjurious statement" (*Weiler* v. *United States*, *supra*, 323 U.S. at 610). See, *e.g.*, *Vetterli* v. *United States*, 198 F. 2d 291, 293 (C.A. 9), vacated and remanded on other grounds, 344 U.S. 872; *United States* v. *Nessanbaum*, 205 F. 2d 93, 98 (C.A. 3); *Umbriaco* v. *United States*, 258 F. 2d 625, 629, n. 6 (C.A. 9); *United States* v. *Zborowski*, 271 F. 2d 661, 664 (C.A. 2); cf. *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 408 (C.A. 2); *DeCasaus* v. *United States*, 250 F. 2d 150 (C.A. 9), certiorari denied, 356 U.S. 949. Therefore, Stern's direct testimony, together with Mishel's corroborative testimony, was sufficient to satisfy the rule of one witness plus corroboration.

b. The evidence on count two [7] rests upon the testimony of Stern that Chait drew money out of a business expense account, the testimony of Mishel that petitioner had told him Chait was drawing weekly

[7] Since the sentences of imprisonment for three years run concurrently on each of the three counts, we believe it is unnecessary to consider the questions raised with respect to count two as far as the prison sentence is concerned. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 359; *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Claassen* v. *United States*, 142 U.S. 140, 146. But since petitioner was also fined $2,000 on each count, we shall discuss count two on the merits.

funds from Stern's Express, and the books and records of the company reflecting a weekly allocation to an expense account of sums roughly equivalent to the amounts drawn weekly by each of the partners (see the Statement, *supra*, pp. 4–7). As the court below held, Stern's testimony that "payments were made to Chait" satisfied the one witness rule, and was amply corroborated by the books and records of the partnership, as well as petitioner's admission to Mishel (Pet. App. 11a).

Moreover, even if petitioner's oral admissions to Stern were considered to be the only source of Stern's knowledge as to the payments to Chait,[8] the evidence on count two would have been sufficient. Although "direct proof" is undeniably an essential element in

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[8] It strains credulity that Stern, a partner in the business and obviously concerned with its finances, would not know from his own observations of Chait's financial interest. Throughout most of Stern's direct testimony, the indications are that he was talking from personal knowledge (see, *e.g.*, 1 R. 41–50). Thereafter, becoming more guarded and vague, he stated that he did not know who gave Chait his weekly share; that he never did; and that he did not know whether Chait "got any money exactly" (1 R. 48–49, 61, 70–71, 72). When, toward the close of his testimony, the trial court pressed him as to the source of his knowledge that money was paid to Chait, he said petitioner told him it was included in expenses (1 R. 75). (See the Statement, *supra*, pp. 4–5.) The government conceded at trial that the only proof on count two came "from the admissions of the defendant and the admissions are corroborated by the documentary evidence * * *" (1 R. 127). The court of appeals stated that it believed the government "needlessly" conceded the nature of the proof on count two (Pet. App. 7a), and held that Stern "provided the testimony of one witness as to the objective facts on Count II" (Pet. App. 12a).

a perjury case (see *United States* v. *Remington*, 191 F. 2d 246, 249 (C.A. 2), certiorari denied, 343 U.S. 907), it is not limited in meaning to eye-witness observations, but may also include testimony which is direct in the sense that, in and of itself, it has a rationally direct and compelling tendency to establish the fact to be proved even though some process of interpretation may be necessary (cf. *United States* v. *Wood*, 14 Pet. 430; *United States* v. *Collins*, 272 F. 2d 650 (C.A. 2), certiorari denied, 362 U.S. 911; see also *Radomsky* v. *United States* 180 F. 2d 781, 783 (C.A. 9)). In *Regina* v. *Hook*, 27 L.J. M.C. (N.S.) 222, 31 L.T. (O.S.) 221 (1858), the English court accepted, as proof of falsity of a policeman's testimony that he had not seen anyone leave a publican's house, evidence that the policeman had shortly before stated a number of times that he had seen such persons leave, plus the corroborating evidence that people did in fact leave the house at a specified time See also *Berwick's Case*, How. St. Trials 367 (1746); Foster, *Crown Cases and Crown Law*, pp. 10, 18, 243–244. In the present case, petitioner's admissions to Stern were stronger than ordinary admissions as to a past act because they were made to a partner in the course of business with respect to the affairs of the business. The admissions should therefore qualify as "direct proof," as similar admissions did in the *Hook* case, and, together with the corroborative evidence of petitioner's admission to Mishel *at a different time* and of the books and records of

the business,[9] should be considered to be sufficient for purposes of sustaining the perjury conviction on count two.[10]

c. Petitioner urges further that his entire conviction on all counts must fall because the corroborative evidence was not inconsistent with his innocence (Pet. 15–17) and did not independently tend to show all the elements of perjury (see cases cited in Pet. 15, n. 15). But in *Weiler* v. *United States, supra,* 323 U.S. at 610, this Court stated that all that was necessary in order that corroborative evidence be sufficient for purposes of sustaining a perjury charge was that the evidence substantiate "the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement," and that the evidence be "trustworthy." And in *Opper* v. *United States,* 348 U.S. 84, 93, the Court stated, with respect to the evidence necessary to corroborate a confession or oral admission, that "the corroborative evidence need not be sufficient, independent of the statements, to establish

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[9] *McWhorter* v. *United States*, 193 F. 2d 982 (C.A. 5), is thus inapposite since in that case the *only* evidence of falsity was the testimony of two witnesses to the *same* statement of the accused contradictory to her allegedly perjurious testimony.

[10] While the majority opinion in *Umbriaco* v. *United States*, 258 F. 2d 625 (C.A. 9), noted that an oral admission of the accused plus corroboration was insufficient to meet the special perjury rule, this statement was not necessary to the decision, since, as the concurring opinion pointed out (258 F. 2d 629–630), the defendant's allegedly perjurious statement under oath, in which she admitted a single act of intercourse for money, did not support the charge in the indictment that she had sworn falsely that she was not a prostitute. See the discussion of *Umbriaco* by the court below (Pet. App. 10a).

the *corpus delicti*. It is necessary, therefore, to require the Government to introduce independent substantial evidence which would tend to establish the trustworthiness of the statement." Accord, *Smith* v. *United States*, 348 U.S. 147, 156. Since the type of evidence necessary for corroboration in perjury cases is comparable to the type necessary in confession or admission cases (see *Warszower* v. *United States*, 312 U.S. 342, 347–348), the corroborative evidence in the present case was not invalid even though it did not independently tend to show all the elements of perjury.

2. Actually, what much of petitioner's argument amounts to is a claim that the testimony of the government witnesses was neither trustworthy nor credible within the principles established in *Weiler* v. *United States*, *supra*, 323 U.S. at 610 (see Pet. 5–9). As to Stern, petitioner contends that his testimony was inconsistent and unresponsive and hence unworthy of belief (Pet. 8, 14). As to Mishel, petitioner alleges that the witness simply adopted his grand jury testimony, thereby fatally prejudicing petitioner's case (Pet. 14, 21).

a. There is no question but that Stern proved to be a reluctant witness, who grudgingly and hesitatingly revealed what he knew of petitioner's association with Chait, and Chait's financial drawings from the firm. It is also true that his answers were at times indefinite and hesitant (see the Statement, *supra*, p. 2). But, as the trial court charged in accord with well settled principles, it was for the jury "to recollect what [Stern's] testimony was and to decide what credence,

if any, you will give to it" (R. 169–170).[11] See, *e.g.*, *Kimes* v. *United States*, 240 F. 2d 301, 302 (C.A. 5), certiorari denied, 354 U.S. 912; *United States* v. *Guido*, 251 F. 2d 1, 5 (C.A. 7), certiorari denied, 356 U.S. 950.

b. The record reveals that Mishel did not, as petitioner says (Pet. 21), simply adopt his grand jury testimony. While it is true that he repeatedly referred to it to refresh his recollection, affirming time and time again that his answers were "true now as then" (R. 102, 105, 107, 108, 111), he "went considerably further before leaving the stand," as the court below noted (Pet. App. 6a). On cross-examination, Mishel stated that he recalled his conversation with petitioner concerning Chait as "being true" (1 R. 117), and explained that he referred to his grand jury testimony because the "incidents took place 10, 12 years ago * * *, I had been under quite a bit of pressure the last few years. So I wanted to refresh" (*ibid.*) Cf. *Cox* v. *United States*, 284 F. 2d 704, 708–709 (C.A. 8), certiorari denied, 365 U.S. 863. Since the determination of the trustworthiness and credibility of corroborative evidence is "a function which belongs exclusively to the jury" (*Weiler* v. *United States*, *supra*, 323 U.S. at 610), and since this question was settled in the present case by a jury under proper instructions, the issue is not one for review by this Court.

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[11] In speaking of Stern's testimony, the court of appeals observed: "[T]o be sure, his testimony was halting and was weakened on later examination, but that was for the jury to weigh under all the circumstances, on instructions as to which appellant makes no complaint" (Pet. App. 11a).

3. During the course of Mishel's direct examination, he was asked whether petitioner had ever told him that Chait had put him into Stern's Express Company. Defense counsel's objection that the question was "not in the issues and prejudicial and irrelevant" was overruled by the trial court (1 R. 104). Mishel was then permitted to read the response he had given before the grand jury in order to refresh his recollection. After stating that such testimony was "true now as then," he read it aloud (1 R. 105):

> Well, he told me that when he come out of the service he figured he was going to go back in the shylocking business but instead he met Big Dick who was connected with the Chaits. I don't know Dick's last name. I think its Kaminsky, Komesky or something like that. And Chait said, "Listen, I got a trucking business. I will put you in. We will work out a proposition." So he went in to Stern's Express.

After the case had been submitted to the jury, a number of the jurors requested that the testimony of Mishel and Stern be read to them on the issue whether petitioner knew Chait before the formation of the partnership (1 R. 178–179). Shortly after some of this testimony had been read as requested, it was discovered that the excerpt from Mishel's testimony quoted above had been overlooked (1 R. 179–180). The excerpt was then read to the jury, the trial judge explaining why it had not been read to them earlier, and directing the jury not to get the impression that the court is "emphasizing or anybody is emphasizing this testimony. It has to be taken in conjunction

with all the other testimony, but it is relevant to the question of the jury" (1 R. 182).

Petitioner argues that the reading of this grand jury testimony to the jury on two occasions was fatally prejudicial because of its reference to "shylocking" which imputed to him the commission of the crime of usury under the New York Penal Law (Pet. 21–22). The complete answer to this argument was given by the court below (Pet. App. 12a–13a):

> * * * [D]efense counsel, who also had a copy of the grand jury transcript before him, instead of merely objecting generally to the prosecutor's clearly proper question * * * could have asked that the witness be cautioned or could have immediately moved to strike or requested an appropriate admonition to the jury. Furthermore, we do not think the jury would have taken the alleged reference to "shylocking" as an admission of previous crime. The later reading of this portion of the transcript to the jury was entirely innocent; it clearly fell within the jury's request as defense trial counsel properly conceded, and the Court warned the jury that the reading was not to be considered as emphasizing this testimony, which must be taken by them in conjunction with all the rest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1961.